

THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

THAN ORN, individually, THALISA ORN,
individually, J.O. and C.O., by their
Guardian, CLARISSE ORN,

Plaintiffs,

vs.

CITY OF TACOMA, a municipal
corporation, and KRISTOPHER CLARK, in
his individual capacity,

Defendants.

No. 3:13-cv-05974-MJP

PLAINTIFFS' TRIAL BRIEF

PLAINTIFFS' TRIAL BRIEF

3:13-cv-05974-MJP | Page 1 of 49

**PFAU COCHRAN
VERTETIS AMALA**
ATTORNEYS AT LAW

909 A Street, Suite 700
Tacoma, WA 98402
(253) 777-0799 | Fax: (253) 627-0654
www.pvalaw.com

I. INTRODUCTION

Plaintiffs, by and through their attorneys of record, respectfully submit this trial brief to address the factual, legal, and evidentiary issues presented by this case.

As the Court knows, this tragic case arises from the events which occurred on the night of October 12, 2011, and which culminated in the unlawful shooting of Plaintiff Than Orn by Tacoma Police Department Officer Kristopher Clark and the Tacoma Police Department's ratification of that shooting. Plaintiffs submit, based upon the testimony of the officers at the scene, admissions by the Chief of Police, objective evidence of the case and the expert opinions of a veteran law enforcement officer and expert in the use of force, that the totality of the circumstances show critical violations in Tacoma Police Department's (TPD) improper pursuit and Officer Clark's excessive use of force which left Than Orn gravely injured and ultimately paralyzed. Those failures, include, but are not limited to:

- TPD's decision to follow Orn's vehicle when only a minor traffic violation, driving without headlights on, had occurred and where no felony situation existed;
- TPD's improper pursuit that continued even after Mr. Orn cured the traffic violation by promptly turning his headlights on when he noticed a police car turning to follow him;
- TPD's use of twenty-two (22) responding vehicles to a non-felony, traffic violation and failure to yield, including anywhere from five to twelve vehicles following directly behind Orn, in violation of TPD policy;
- TPD's attempts to use an improper, policy-violating "rolling roadblock" to stop Orn's vehicle;
- TPD's failure to remove its scene commander, Sgt. Al Morris, from the lead car while in pursuit of Orn;
- Officer Clark's improper and unlawful use of his patrol vehicle as a roadblock to stop a suspect who was neither assaultive nor life-threatening under TPD policies and the universally accepted continuum of force model;
- Officer Clark's defiance of repeated dispatch commands for officers to remain in

PLAINTIFFS' TRIAL BRIEF

3:13-cv-05974-MJP | Page 2 of 49

**PFAU COCHRAN
VERTETIS AMALA**
ATTORNEYS AT LAW

909 A Street, Suite 700
Tacoma, WA 98402
(253) 777-0799 | Fax: (253) 627-0654
www.pvalaw.com

1 their vehicles;

- 2 • Officer Clark's decision to fire 2-3 times at a vehicle that was passing him and was not an imminent danger of harm or death to either Officer Clark or anyone else; and,
- 3 • Officer Clark's decision to continue firing 7-8 more times as the vehicle was
- 4 traveling away from him, when neither he, nor anyone else was in imminent danger of harm or death.

5 Neither the actions of TPD's officers in pursuit of Than Orn nor the actions of Officer
6 Clark in repeatedly shooting Orn were objectively reasonable based upon a totality of the
7 circumstances. These actions resulted in catastrophic and permanent harm to Plaintiff Than
8 Orn, and by extension to his children, who have been deprived of their relationship with Than
9 Orn, their father, as a result of his injuries. Plaintiffs thank the Court for its work on this matter
10 and looks forward to a spirited and concise presentation of the case.

12 II. FACTUAL BACKGROUND

13 The Court is acquainted with the basic factual outline of events but, for purposes of
14 evaluating some of the liability and damages issues, the following facts should prove useful.

16 A. TPD's initial interaction with Than Orn – Sgt. Alan Morris

17 Than Orn was a 34-year-old Cambodian-American husband and father of three living
18 in an apartment complex on S. 65th St. and Tacoma Mall Boulevard, when, on October 12, 2011,
19 his life changed forever.¹ At approximately 8:30 p.m., Orn was driving a white Mitsubishi
20 Montero SUV down S. 64th St., with his parking lights on but his headlights were off.² Orn
21 passed a silver vehicle with no visible light bar, driven by TPD Sgt. Alan Morris going in the
22

25 ¹ Cochran Dec. at ¶ 2, Ex. 1, at 7:12-20, 127:7-15 (Deposition of Plaintiff Than Orn).

26 ² Cochran Dec. at ¶ 2, Ex. 1, at 124:9-14.

opposite direction.³ Morris drove past the white SUV, turned his vehicle around, turned on his emergency lights mounted at the top of his windshield and accelerated to catch up to Orn.⁴ At 8:31 p.m., Sgt. Morris radioed to dispatch that he was attempting to pull the vehicle over but that the vehicle was not stopping.⁵ The driver's speeds were between 25 and 35 MPH at their fastest, and Morris did not consider the driver's actions reckless.⁶ Morris followed the vehicle and continued to give updates to dispatch.⁷ Morris considered Orn's actions to be failing to yield.⁸

B. Growing Procession Following Orn and a Rolling Roadblock

Officer Daniel Bortle joined Sgt. Morris in the pursuit of Than Orn. According to Officer Bortle, he maneuvered his patrol car alongside Orn with Sgt. Morris "to try and box [Orn] in."⁹ Although it was never reported to dispatch, three to four minutes after Officer Bortle pulled alongside Orn, Officer Bortle, Sgt. Morris and Officer Michael Johnson initiated a "rolling roadblock" in an attempt to stop Orn's vehicle.¹⁰

³ Cochran Dec. at ¶ 3, Ex. 2, at 18:6-7, 19:3-7, 20:13-17 (Deposition of Alan Morris).

⁴ Cochran Dec. at ¶ 3, Ex. 2, at 19:3-7, 22:9-17.

⁵ Cochran Dec. at ¶ 4, Ex. 3 (CAD Report). See also Exhibit 4 for a true and accurate copy of an audio CD of the CAD voice transmissions. Cochran Dec. at ¶ 5, Ex. 4. The voice tracks begin with Sgt. Morris's first call to dispatch through the point that shots were fired and end shortly after Orn's vehicle crashed through a fence and a brick wall.

⁶ Cochran Dec. at ¶ 3, Ex. 2, at 21.

⁷ Cochran Dec. at ¶ 3, Ex. 2, at 23.

⁸ Cochran Dec. at ¶ 3, Ex. 2, at 23.

⁹ Cochran Dec. at ¶ 6, Ex. 5, at 10:5-11:10 (Deposition of TPD Officer Daniel Bortle).

¹⁰ Cochran Dec. at ¶ 6, Ex. 5, at 10:23-11:10, 14:22-15:12, 16:15-21.

1 Q At any point when you were involved were there at least
2 three vehicles that were surrounding Mr. Orn's traveling
vehicle?

3 A Yes.

4 Q And was there an attempt to try and bring him to a stop?

5 A Yes.¹¹

6 Officer Bortle, Sgt. Morris and Officer Michael Johnson pulled alongside Orn, traveling
7 between 5 and 15 m.p.h.¹² Sgt. Morris remained the supervisor of the Orn pursuit while the
8 rolling roadblock was taking place.¹³ According to Officer Bortle, TPD's policy at the time
9 regarding the use of a rolling roadblock was that it was only allowable in situations involving
10 the use of deadly force, where the situation involved an imminent threat to bodily injury or
11 death.¹⁴ But Officer Bortle admits there were no reports of Than Orn being suspected of a
12 violent felony or that he had a firearm.¹⁵ Further, there were no reports of Than Orn's actions
13 escalating which justified the use of deadly force.
14

15 C. Clark's Actions Leading to the Shooting

16 Officers Donald Rose and Kristopher Clark were inside TPD's three sector substation
17 at Wapato Park when they heard Sgt. Morris first call out that he was trying to stop Than Orn's
18 vehicle.¹⁶ Sgt. Morris had radioed dispatch that the vehicle was failing to yield.¹⁷
19
20

21 ¹¹ Cochran Dec. at ¶ 6, Ex. 5, at 19:12-17.

22 ¹² Cochran Dec. at ¶ 6, Ex. 5, at 25:4-23.

23 ¹³ Cochran Dec. at ¶ 6, Ex. 5, at 27:5-22.

24 ¹⁴ Cochran Dec. at ¶ 6, Ex. 5, at 21:20-25; 22:1-3.

25 ¹⁵ Cochran Dec. at ¶ 6, Ex. 5, at 26:18-21.

26 ¹⁶ Cochran Dec. at ¶ 7, Ex. 6, at 12:2-16 (Deposition of TPD Officer Donald Rose).

¹⁷ Cochran Dec. at ¶ 7, Ex. 6, at 12:22-24.

1. Paralleling Orn's Route.

Officers Rose and Clark went out to Clark's Ford Expedition patrol vehicle and headed to the direction that Sgt. Morris was calling out over the radio.¹⁸ Officers Rose and Clark were about 15 blocks away from Sgt. Morris.¹⁹ Officers Rose and Clark knew that only a traffic violation had occurred and that Orn's vehicle was failing to yield.²⁰ The officers also knew that neither violation was a felony and that Orn's vehicle was not implicated as being involved in any felony situation.²¹ In the continuum of force as the officers understood Than Orn's behavior, Orn was only considered to be "active resistant."²² Officers Rose and Clark were "paralleling the pursuit," meaning they were not in line with other officers following Orn but were following on side streets.²³ Five to seven TPD vehicles were following behind Orn at this time.²⁴

Officers Clark and Rose blocked westbound traffic at the intersections of 56th and Alaska by positioning the Expedition in the roadway with their lights on in order to keep general traffic away.²⁵ Neither Officer Clark nor Officer Rose left the vehicle.²⁶ A nearby officer was laying out spike strips in the road to try and puncture Orn's tires.²⁷ According to Officer Rose,

¹⁸ Cochran Dec. at ¶ 7, Ex. 6, at 27:5-12.

¹⁹ Cochran Dec. at ¶ 7, Ex. 6, at 28:13-15.

²⁰ Cochran Dec. at ¶ 7, Ex. 6, at 30:11-24.

²¹ Cochran Dec. at ¶ 7, Ex. 6, at 30:11-24.

²² Cochran Dec. at ¶ 7, Ex. 6, at 31:1-4.

²³ Cochran Dec. at ¶ 7, Ex. 6, at 32:6-10.

²⁴ Cochran Dec. at ¶ 7, Ex. 6, at 34:17-23.

²⁵ Cochran Dec. at ¶ 7, Ex. 6, at 33:2-17.

²⁶ Cochran Dec. at ¶ 7, Ex. 6, at 33:18-23.

²⁷ Cochran Dec. at ¶ 7, Ex. 6, at 35:15-22.

1 Than Orn, still only traveling at or about 30 m.p.h. swerved his vehicle away from the officer
 2 deploying the spike strips rather than drive at him.²⁸ At the time Orn's vehicle swerved around
 3 the spike strips, there was no oncoming traffic and no danger in his pathway.²⁹ In addition,
 4 Orn's speed continued to be a "pretty low speed" between approximately 30-35 m.p.h.³⁰

5
 6 **2. Officers Clark and Rose Cut Through the Apartment Complex to Get in Front of Orn.**

7 After paralleling Orn's vehicle, Officers Clark and Rose heard over the radio that Orn's
 8 vehicle was registered to an apartment at the Valley Vista apartment complex just off Tacoma
 9 Mall Boulevard.³¹ At the time, the patrol cars following Orn were at the south entrance of the
 10 apartments.³² Officers Clark and Rose pulled into the north entrance to get in front of Orn.³³

11
 12 **3. Officer Clark Sets Up a Roadblock and Disobeys Commands to Stay in His Car, Compelling a Confrontation and the Use of Deadly Force.**

13 Once he was inside the parking lot of the Valley Vista apartment complex, Officer Clark
 14 positioned his vehicle in the thoroughfare of the main parking lot near the north entrance so that
 15 the front of his vehicle was near a grassy island that butted out into the parking lot.³⁴ In an
 16 interview with Than Orn's criminal trial counsel, Tom Balerud, Officer Clark explained that
 17 his "strategy was to find a point that we could utilize our vehicle to prevent the suspect [Than
 18
 19
 20
 21

22 ²⁸ Cochran Dec. at ¶ 7, Ex. 6, at 36:10-16.

23 ²⁹ Cochran Dec. at ¶ 7, Ex. 6, at p. 39:8-22.

24 ³⁰ Cochran Dec. at ¶ 7, Ex. 6, at 41:20-25, 42:1-2.

25 ³¹ Declaration of TPD Officer Kristopher Clark at ¶¶ 7-8. Dkt. 92.

26 ³² Cochran Dec. at ¶ 7, Ex. 6, at 44:19-25.

³³ Declaration of TPD Officer Kristopher Clark at ¶ 8. Dkt. 92; Cochran Dec. at ¶ 7, Ex. 6, at 44:23-25; 45:5-7.

³⁴ Cochran Dec. at ¶ 7, Ex. 6, at 46:1-7.

Orn] from leaving the parking lot.”³⁵ Clark explicitly stated that he “knew there was one exit out of that apartment complex when you’re going northbound” and that he “did block a[sic] exit.”³⁶ Clark further agreed that his full-size SUV was big enough to block the exit.³⁷

In the criminal trial in which Than Orn was acquitted of assault, Clark testified:

[A] When we went into the parking lot we ultimately went into the apartment complex and blocked a narrow point of the parking lot.

...

[Q] When you drove your vehicle into the parking lot and parked it in that location, what were you trying to do?

A When I stopped in that location, I was trying to stop Mr. Orn so that we could apprehend him. And I was trying to stop any citizens from, you know, accidentally again entering into his path of flight.

Q Did you believe you had accomplished that?

A Yes.

Q Did you believe there was any way the defendant could get through?

A No.³⁸

Other officers concur that Officer Clark’s vehicle was a roadblock. Officer Clark’s partner, Officer Rose, described Officer Clark’s vehicle positioning as “effectively cut[ting] off

³⁵ Cochran Dec. at ¶ 8, Ex. 7, at 26: 1-3 (Balerud Interview of Officer Kristopher Clark Prior to Criminal Trial).

³⁶ Cochran Dec. at ¶ 8, Ex. 7, at 28: 2, 5-6.

³⁷ Cochran Dec. at ¶ 8, Ex. 7, at 28: 12-14.

³⁸ Cochran Dec. at ¶ 9, Ex. 8, at 211:3-5, 216:16-25, 217:1-2. (Trial Transcript of TPD Officer Kristopher Clark).

1 northbound travel through the parking lot right there.”³⁹ Officer Daniel Bortle described Officer
 2 Clark’s SUV as facing in an east-westerly position and blocking the roadway.⁴⁰

3 Officer Richard Kim, who was immediately behind Orn as he was traveling through the
 4 apartment complex, also testified that he viewed Clark’s vehicle blocking the roadway.⁴¹
 5 Officer Kim further testified Than Orn’s actions did not justify Officer Clark’s use of a
 6 roadblock.
 7

8 [A] As far as I can recall, the department has never allowed
 9 roadblocks to be a regularly-used technique or tactic.

10 Q And in fact, the only time that a roadblock is allowed
 11 under Tacoma Police Department policy is when there’s
 the necessity of using deadly force, right?

12 A That’s correct.

13 Q And you testified before that at least when you came to
 14 the front of the line and you were the next car behind
 15 Than Orn, that he was actively resistant and not life-
 threatening in his subject actions; is that right?

16 A That's correct.

17 Q So am I correct that, at least according to your
 18 observations as the lead pursuit car, there was no
 19 reasonable use of a roadblock to stop Than Orn on
 October [12]th of 2011, right?

20 ...
 21
 22
 23

24 ³⁹ Cochran Dec. at ¶ 7, Ex. 6, at 46:6-7.

25 ⁴⁰ Cochran Dec. at ¶ 6, Ex. 5, at 46:15-20.

26 ⁴¹ Cochran Dec. at ¶ 10, Ex. 9, at 30:3-23 (Deposition of TPD Officer Richard Kim).

A No. That would be, in my opinion, no -- nothing that Mr. Orn did would, you know, necessitate a roadblock being used.⁴²

Officer Kim also testified that he heard the direction over the radio that officers were supposed to stay in their vehicles.⁴³ Even TPD Chief Ramsdell, in reviewing both the Pursuit Review Board's findings and the Use of Deadly Force Review Board's findings, agrees that Officer Clark ignored the command to stay in his vehicle, and instead, used his car as a roadblock.

[Q] Were officers told to stay in their vehicles?

A I believe they were. I am not 100 percent sure, but I believe they were, by the sergeant.

Q As you sit here today, under oath, is it your best understanding that the officers were indeed told to stay in their vehicles by the commanding officer, Sergeant Al Morris?

A To the best of my understanding, yes.

Q And Officer Clark did not do that, did he?

...

A No, he did not.

Q (By Mr. Cochran) Instead, he set up a roadblock and then left his vehicle, correct?

...

A Correct.⁴⁴

⁴² Cochran Dec. at ¶ 10, Ex. 9, at 29:5-25, 30:1-2.

⁴³ Cochran Dec. at ¶ 10, Ex. 9, at 31:9-15.

⁴⁴ Cochran Dec. at ¶ 11, Ex. 10, at 66:15-25, 67:1-5 (Deposition of TPD Chief Donald Ramsdell).

1 **4. Officer Clark Immediately Got Out of His Ford Expedition.**

2 Officer Clark admitted in his deposition that he also heard the direction to stay in his
3 patrol vehicle.

4
5 Q Do you recall receiving direction, either from Sergeant
6 Morris or from Canine Officer Dave Johnson, to stay in
7 your vehicle?

8 A I don't know specifically who said it, but I do recall
9 somebody saying, "Stay in your vehicles."⁴⁵

10 ...

11 Q Why didn't you stay in your car?

12 A Because I believed there was a potential that Mr. Orn
13 was going to strike my vehicle, and I didn't want to be
14 on the receiving end of it.⁴⁶

15 Officer Clark also stated, "[I] watched Mr. Orn drive through the thoroughfare passing
16 several turn offs and heading towards the driver's side of my patrol car. Fearing that he was
17 going to ram the patrol car on the driver's side, I exited the vehicle and positioned myself about
18 10 feet away and out of Mr. Orn's path of travel."⁴⁷

19 Once again, however, Officer Clark's partner, Officer Rose, remembers Officer Clark's
20 actions much differently. Officer Rose testified that Officer Clark parked his patrol vehicle
21 blocking the road, did not say anything to Officer Rose, and then simply exited the vehicle
22 while Orn was still 75 to 100 yards away.⁴⁸

23
24 ⁴⁵ Cochran Dec. at ¶ 12, Ex. 11, at 105:10-14 (Deposition of TPD Officer Kristopher Clark).

25 ⁴⁶ Cochran Dec. at ¶ 12, Ex. 11, at 106:16-19.

26 ⁴⁷ Declaration of TPD Officer Kristopher Clark at ¶ 11. Dkt. 92.

⁴⁸ Cochran Dec. at ¶ 7, Ex. 6, at 47:9-11.

Q If you were to estimate in yards, about how many yards away was Than Orn's vehicle when you first noticed it when the vehicle in which you were -- had been traveling with Kristopher Clark was stopped?

A Okay. It was a pretty good chunk. I'd say maybe 75, 100 yards away.

Q About a football field's distance?

A About, give or take.

Q And at that point Officer Clark had left the vehicle; is that right?

A That's right.⁴⁹

5. Orn's Vehicle Traveled Slowly Through the Apartment Complex and Came to a Pause or a Stop.

As Than Orn's vehicle entered the Valley Vista apartment complex, Officer Bortle, who was traveling in the caravan behind Orn with Officer Kim, K-9 Officer David Johnson, and Sgt. Morris, estimates that Orn traveled approximately 15 m.p.h.⁵⁰ Officer Bortle also testified that as Orn's vehicle approached Clark's Expedition, "[f]or just a brief second the vehicle did pause."⁵¹

Officer Kim, travelling immediately behind Orn, testified in Than Orn's criminal trial and in his deposition for this action that Orn was traveling very slowly in the apartment complex.⁵² Officer Kim then observed Orn's vehicle come to a stop.

⁴⁹ Cochran Dec. at ¶ 7, Ex. 6, at 52:20-25, 53:1-5.

⁵⁰ Cochran Dec. at ¶ 6, Ex. 5, at 45:7-10.

⁵¹ Cochran Dec. at ¶ 6, Ex. 5, at 49, 1.5.

⁵² Cochran Dec. at ¶ 10, Ex. 9, at 41:23-25, 42:1-4.

[Q] So as he's slowly approaching Officer Clark's vehicle, Mr. Orn's white Mitsubishi SUV actually comes to a stop, correct?

A Correct.

Q Okay. About how far away was he from Officer Clark at that point?

A I'd say probably more than a car length, not much more.⁵³

...

Q Okay. So –

A 20 to 25.

Q 20 to 25 feet away. And was it a full stop that he came to?

A I recall it being a full stop, yes.

Q In fact, you testified that it was at least a few seconds; is that right?

A Yes.⁵⁴

6. Orn Drove Away from Officer Clark and Around Clark's Ford Expedition

It is undisputed that as he approached Officer Clark's Ford Expedition, Than Orn drove away from where Officer Clark had positioned himself, and instead drove onto a grass planting strip around Clark's vehicle and opposite of where Clark was standing.⁵⁵ Officer Steven Butts, who also came in at the north entrance of the apartment complex, arrived in his patrol car at

⁵³ Cochran Dec. at ¶ 10, Ex. 9, at 42:5-12.

⁵⁴ Cochran Dec. at ¶ 10, Ex. 9, at 42:16-25, 43:1-8.

⁵⁵ Cochran Dec. at ¶ 13, Ex. 12 (Total Station Diagram).

1 approximately the same time as Officers Clark and Rose and parked his vehicle just north of
 2 where Clark's Expedition was blocking the road.⁵⁶ Officer Butts stayed in his patrol vehicle
 3 behind Officer Clark's vehicle but could see Orn's caravan coming forward.⁵⁷ He watched as
 4 Than Orn's vehicle was coming closer to Officer Clark's blocking vehicle. Orn was traveling
 5 "maybe five miles an hour when it slowed."⁵⁸ Then Orn either stopped or slowed down
 6 substantially before Officer Clark's vehicle. Butts watched the Orn vehicle drive away from
 7 where Clark had positioned himself, and then up on the grass planting strip. Officer Butts
 8 testified that Orn's vehicle was going very slowly, 3-4 m.p.h., as it went onto the grass and back
 9 down again.⁵⁹ As Orn was driving on the grass planting strip, Butts intentionally backed his
 10 car up seeking to cut off any route for Than Orn to escape.⁶⁰ After doing so, Orn's vehicle, still
 11 traveling 4 m.p.h. according to Butts, came into contact with the front push bar of Butts's car.⁶¹
 12 Butts heard plastic crunching and felt a jarring of the vehicle, but the impact was so minor that
 13 it didn't actually move Butt's vehicle.⁶²
 14
 15
 16
 17
 18
 19
 20

21 ⁵⁶ Cochran Dec. at ¶ 14, Ex. 13, at 356:9-25, 358:2-5 (Trial Transcript of TPD Officer Steven Butts).

22 ⁵⁷ Cochran Dec. at ¶ 14, Ex. 13, at 360:20-25, 361:1-6.

23 ⁵⁸ Cochran Dec. at ¶ 14, Ex. 13, at 361:3-6.

24 ⁵⁹ Cochran Dec. at ¶ 14, Ex. 13, at 389.

25 ⁶⁰ Cochran Dec. at ¶ 14, Ex. 13, at 380:24-25, 381:1-2.

26 ⁶¹ Cochran Dec. at ¶ 14, Ex. 13, at 376:14-16.

⁶² Cochran Dec. at ¶ 14, Ex. 13, at 380:2-9.

7. Orn's Vehicle did not Accelerate Hard Prior to the Shooting

As he was coming through the narrow entrance, Orn also made contact with the rear bumper of Officer Clark's Expedition.⁶³ Officer Rose, who was still in the vehicle, called the contact from Orn a glancing blow.

Q And you said in fact the vehicle that you were in, you and Officer Clark, didn't move much at all when Than Orn hit the vehicle; right?

A Correct.

Q So it wasn't a particularly powerful blow; right?

A Again, it was a glancing blow, correct.

Q But a glancing blow that didn't move your vehicle much?

A It didn't seem to significantly shift the vehicle no.⁶⁴

Officer Clark states that he moved from the grass median where he was standing (opposite of the grass patch Orn drove on), to a position either at or behind his vehicle's bumper on the passenger side.⁶⁵ Clark further states that he was positioned "out of [Orn's] direct path of travel."⁶⁶ However, neither of the officers immediately in the area, Rose or Butts, saw Officer Clark.⁶⁷

⁶³ Cochran Dec. at ¶ 15, Ex. 14.

⁶⁴ Cochran Dec. at ¶ 7, Ex. 6, at 57:15-22.

⁶⁵ Declaration of TPD Officer Kristopher Clark at ¶¶ 17-18. Dkt. 92.

⁶⁶ Declaration of TPD Officer Kristopher Clark at ¶¶ 17-18. Dkt. 92.

⁶⁷ Cochran Dec. at ¶ 14, Ex. 13, at 379:3-11.

Officer Clark claims he then saw Orn's vehicle turn towards him and the vehicle accelerated at him. Officer Clark also states that at that same moment, he "could hear the engine of [Orn's] vehicle under hard acceleration."⁶⁸ ⁶⁹ Clark doesn't explain how but, despite his position behind the bumper, he claimed the vehicle was now coming at him.⁷⁰ Officer Clark then claims that he extended his left arm to brace for the impact of Orn's vehicle and began to move backwards.⁷¹ He claims he believed that Orn was trying to run him over, and because of his close proximity to Orn's vehicle, he had to raise his pistol and fire downward while his left hand remained on Orn's vehicle.⁷²

Officer Butts, who approximates that he was no more than eight feet from Clark's vehicle, did not see Officer Clark get struck by Orn's vehicle.⁷³ Officer Butts watched Orn's vehicle traveling right in front of him, going 3-4 m.p.h. as it was coming off the grass, but Officer Butts did not see Clark reach out his hand and touch the car.⁷⁴ ⁷⁵ He just heard shots being fired and glass shattering on Orn's vehicle.⁷⁶ Officer Butts also testified to a much different time sequence of the alleged hard acceleration by Than Orn's vehicle. Rather than a

⁶⁸ Cochran Dec. at ¶ 16, Ex. 15, at 63:8-20 (Deposition of John Hunter). Defendants' expert accident reconstructionist admits that "acceleration" just means the tire is moving forward. And despite Clark's allegation of "hard acceleration," Hunter's modeling had Orn's vehicle only going 10 m.p.h.

⁶⁹ Declaration of TPD Officer Kristopher Clark at ¶ 18. Dkt. 92.

⁷⁰ Declaration of TPD Officer Kristopher Clark at ¶ 18. Dkt. 92.

⁷¹ Declaration of TPD Officer Kristopher Clark at ¶ 18. Dkt. 92.

⁷² Declaration of TPD Officer Kristopher Clark at ¶ 18. Dkt. 92.

⁷³ Cochran Dec. at ¶ 14, Ex. 13, at 378:5-23.

⁷⁴ Cochran Dec. at ¶ 14, Ex. 13, at 378: 5-23.

⁷⁵ Cochran Dec. at ¶ 14, Ex. 13, at 368: 5-8, 369:4-7.

⁷⁶ Cochran Dec. at ¶ 14, Ex. 13, at 369: 1-13.

“hard acceleration” before shots were fired as claimed by Officer Clark, Officer Butts heard the hard acceleration only after Clark fired his gun.

Q ... What did the defendant's vehicle do after you heard the shots fired?

A Saw the window breaking and then I remember hearing the engine rev distinctly and it accelerated rapidly eastbound, hit the fence and got stuck up on the fence.⁷⁷

...

Q And the acceleration you heard was after my client had a bullet in his spine?

A It was after I heard shots fired, yes.

Q And not just the sound of acceleration, but the visual of acceleration followed contact with your vehicle, which followed -- followed the shots, the acceleration followed the shooting?

A Correct.

Q Lastly, did you hear Officer Clark say anything prior to shooting my client?

A Not that I recall.⁷⁸

D. Officer Clark Chased After Orn Firing His Weapon

Officer Clark has described his second volley of shots at the Orn vehicle as being fired because he was in fear for the safety of his partner, Officer Donald Rose. “I believed that Mr. Orn had just assaulted me with a deadly weapon and that he would intentionally try and run

⁷⁷ Cochran Dec. at ¶ 14, Ex. 13, at 369: 9-13; 376:7-13.

⁷⁸ Cochran Dec. at ¶ 14, Ex. 13, at 381: 13-23.

1 other officers over, and therefore, I believed that Mr. Orn was an imminent threat to my partner.
 2 Therefore, I fired five or six more times, in rapid succession, at Mr. Orn through the back
 3 window of his SUV.”⁷⁹ Officer Rose, however, was inside the Ford Expedition and never exited
 4 the patrol vehicle until after Than Orn was shot. More importantly, Officer Rose does not recall
 5 his partner, Officer Clark, ever telling him about his concerns for Officer Rose’s safety. Instead,
 6 the only safety concern Officer Clark told Officer Rose about was his own, even as Orn’s
 7 vehicle was moving away.
 8

9
 10 Q And to the best of your recollection as you sit here
 11 today, in your conversation with Officer Clark he said
 that the reason he fired was fear of his own safety?

12 A I believe so.

13 Q And based on your training and experience as a Tacoma
 14 Police Department officer for the past more than eight
 years – right?

15 A Mm-hm.

16 Q -- would you consider your own safety to be in danger
 17 from a fleeing vehicle that was moving away from you?

18 A At that time, no.⁸⁰

19 Officer Robert DeNully told investigators that as he pulled into the northern entrance of
 20 the Valley Vista Apartments, parked north of where Officer Clark had parked his Expedition,
 21
 22
 23

24
 25 ⁷⁹ Declaration of TPD Officer Kristopher Clark at ¶ 19. Dkt. 92

26 ⁸⁰ Cochran Dec. at ¶ 7, Ex. 6, at 62: 21-25, 63:1-5, 68:15-25, 69:1.

1 and exited his vehicle, he saw Officer Clark running and shooting.⁸¹ “He was running towards
2 the direction of the suspect vehicle was (sic).”⁸²

3 Chief Donald Ramsdell, in his administrative review of the Use of Deadly Force Review
4 Board’s finding, confirmed two things: 1) That Officer Clark’s official statement to
5 investigators about his safety were different than what he told his partner, Officer Rose; and 2)
6 No one, not Clark, Rose or anyone else, was in the path of danger while Officer Clark was
7 “running and shooting,” as Officer DeNully described it, as Than Orn’s vehicle was moving
8 away.
9

10
11 Q In the second volley of shots from Officer Clark to Than
12 Orn, he didn't indicate that he was afraid for his own
safety, did he, to the best of your recollection?

13 A To the best of my recollection, he was fearful for others,
14 as I indicated earlier, whether they were officers or other
individuals.

15 Q Are you aware of any individuals who were in the
16 pathway of Than Orn when Kristopher Clark was firing
the second volley of shots?

17 A I am not.

18 Q And are you aware of any other officers that were in the
19 path of Than Orn when Kristopher Clark fired his
20 second volley of shots?

21 A I am not, no.
22
23
24

25 ⁸¹ Cochran Dec. at ¶ 17, Ex. 16.

26 ⁸² Cochran Dec. at ¶ 17, Ex. 16.

1 Q Is it your belief that there was anyone from the public
2 who was in the pathway of Than Orn when Kristopher
Clark fired his second volley of shots?

3 A That was not -- no. My recollection is that -- my understanding is there was no
4 other individuals in the way.⁸³

5 **E. Palm Prints on Orn's Vehicle Could Not Be Linked to Officer Clark, No Other**
6 **Officers Observed the Alleged Touch, and Clark Fired at Than Orn's Vehicle**
7 **When There Was No Direct Threat to Him.**

8 In addition to the multiple, significant differences between what Officer Kristopher
9 Clark told investigators versus what others observed and the admissions Clark made to his
10 partner, Officer Donald Rose, the objective evidence does not support Clark's claims about the
11 shooting of Than Orn. First, Detective Gene Miller, the detective tasked with investigating the
12 shooting scene, testified that Kristopher Clark's alleged palm print on the side of the Orn vehicle
13 could not be conclusively matched to Officer Clark.⁸⁴ "Other than the information from Officer
14 Clark and the presence of the palm print, handprint, whatever it was, that couldn't be
15 conclusively linked to him, and some point of Mr. Orn's statement, where he said he saw the
16 officer advancing on his vehicle, or what he believed to be advancing on his vehicle. There
17 were no other officers that observed Officer Clark get struck or that type of thing."⁸⁵

18 Second, the objective evidence showed that Than Orn's vehicle was not a threat to
19 Officer Kristopher Clark at any point when he fired because Orn's vehicle was already passing
20 by.
21
22

23
24 ⁸³ Cochran Dec. at ¶ 11, Ex. 10, at 63:5-24.

25 ⁸⁴ Cochran Dec. at ¶ 18, Ex. 17, at 86:13-24 (Deposition of TPD Detective Gene Miller).

26 ⁸⁵ Cochran Dec. at ¶ 18, Ex. 17, at 86:13-24.

1 Q And I'm most interested in the objective evidence as you
2 reviewed it. Was there any immediate threat to Officer
Clark as he was firing his weapon at Than Orn?

3 A In the moment that he's firing the weapons, he's already
4 to the side and subsequently to the back of the vehicle.
5 So that threat, based on that information, no longer
exists.⁸⁶

6 ...

7 Q The objective evidence shows that there was no
8 immediate threat to Officer Clark, to any member of the
9 public, or any member of the Tacoma Police Department
at the time that he was firing at Than Orn; correct?

10 A No immediate threat in that moment in time.⁸⁷

11 Third, the defendants' ballistic expert has testified that the angle of the first volley of
12 shots shows that the paralyzing shot to Than Orn's back from the passenger-rear window was
13 fired between 2 feet and 4 feet away from the side of the car, contradicting Officer Clark's
14 claims that he was touching Orn's vehicle as it was passing him.⁸⁸

15 F. TPD Response

16 1. Pursuit Review Board – Failure to Yield.

17 The City of Tacoma's Pursuit Review Board met on March 28, 2012, to listen to the
18 audio tape of the incident involving the TPD and Than Orn as provided by the Law Enforcement
19 Support Agency (LESA), and reviewed supplemental reports.⁸⁹ The Board used two operative
20
21

22
23 ⁸⁶ Cochran Dec. at ¶ 18, Ex. 17, at 79:6-12.

24 ⁸⁷ Cochran Dec. at ¶ 18, Ex. 17, at 79:16-20, 131:21-25, 132:1-15.

25 ⁸⁸ Cochran Dec. at ¶ 19, Ex. 18, at 41:3-11 (Deposition of Matthew Noedel).

26 ⁸⁹ Cochran Dec. at ¶ 20, Ex. 19 (Pursuit Review Board Incident #11-357-1063, Pursuit Review Board Committee Minutes and Bureau Level Complaint (2))

1 definitions in its review.⁹⁰ According to TPD’s Pursuit Review Committee Report, a Vehicle
 2 Pursuit is: An active attempt by an Officer to apprehend a suspect who willfully fails to
 3 immediately bring his or her vehicle to a stop, and drives in a reckless and evasive manner while
 4 attempting to elude a pursuing police vehicle.⁹¹ According to the same report, a Failure to Yield
 5 is: Where an Officer signals a driver to stop, and the driver fails or refuses to immediately bring
 6 his or her vehicle to a stop, *and drives in a manner that is not reckless and does not pose an*
 7 *immediate threat to community safety.*⁹² On April 25, 2012, the Board rendered its disposition
 8 of the incident review as a “Failure to Yield,” determining Orn’s driving as “not reckless” and
 9 not posing “an immediate threat to community safety.”⁹³ In addition, the Board levied the
 10 following training recommendations: 1) Continue with PIT (Pursuit Immobilization Technique)
 11 training for all Officers; 2) Radio communication regarding information that should be relayed
 12 i.e., speed, direction of travel, conditions of roadways, reason for attempted stop; 3) Number of
 13 vehicles involved should stay within policy and others should parallel the incident; and 4)
 14 Supervisor to give clarifying direction to units involved in pursuit and if the Supervisor is in
 15 the lead position it should be handed off to another unit as soon as practical. *Id.*

18 Regarding the number of TPD which responded to this “failure to yield,” TPD policy
 19 3.2.2, Vehicle Pursuit Operations, states that, “No more than three patrol units should be
 20 committed as pursuit vehicles, unless the supervisor or primary unit specifically advises that
 21

23 ⁹⁰ Cochran Dec. at ¶ 20, Ex. 19.

24 ⁹¹ Cochran Dec. at ¶ 20, Ex. 19.

25 ⁹² Cochran Dec. at ¶ 20, Ex. 19 (emphasis added).

26 ⁹³ Cochran Dec. at ¶ 20, Ex. 19.

1 additional units are needed to safely affect the arrest of the suspect or suspects.”⁹⁴ Here, twenty-
 2 two (22) vehicles⁹⁵ responded to Sgt. Morris’s reports of a failure to yield.⁹⁶ And although the
 3 exact number of vehicles that were actually in the caravan pursuing the Orn vehicle cannot be
 4 precisely determined, TPD Assistant Chief Kathy McAlpine admitted that it was a “big
 5 response.”⁹⁷

7 Interestingly, the decision of the pursuit review board to label the on-the-road incident
 8 involving Than Orn’s vehicle as a “failure to yield” was not unanimously supported. Based on
 9 his understanding of the facts and TPD policy that existed at the time of the shooting in October
 10 2011, Assistant Police Chief Michael Ake testified that he believed the chase of Than Orn was
 11 indeed a pursuit, and most importantly, “[W]e (TPD) shouldn’t have allowed that pursuit.”⁹⁸
 12 Assistant Police Chief Kathy McAlpine and Chief of Police Donald Ramsdell both agreed with
 13 Chief Ake, that it was an **out-of-policy pursuit**.⁹⁹

15 2. Use of Force Review Board – Retraining Required.

16 On May 10, 2012, TPD’s Use of Deadly Force Review Board met to consider whether
 17 Officer Kristopher Clark’s use of deadly force against Than Orn was “reasonable and within
 18 Department policy.”¹⁰⁰ The final decision was ratified and approved by Chief of Police Donald

21 ⁹⁴ Cochran Dec. at ¶ 21, Ex. 20 (TPD policy 3.2.2).

22 ⁹⁵ Cochran Dec. at ¶ 22, Ex. 21 at 40: 24-25, p. 41:1-3 (Deposition of TPD Assistant Chief Kathy McAlpine). One
 Pierce County Sheriff’s Office vehicle and one Lakewood Police Department vehicle also responded apparently
 as self-deployed units.

23 ⁹⁶ Cochran Dec. at ¶ 22, Ex. 21 at 41:4-16.

24 ⁹⁷ Cochran Dec. at ¶ 22, Ex. 21 at 41:4-16.

25 ⁹⁸ Cochran Dec. at ¶ 23, Ex. 22 at 66:4-7 (Deposition of Michael Ake) (emphasis added).

26 ⁹⁹ Cochran Dec. at ¶ 11, Ex. 10 at 12:1-14.

¹⁰⁰ Cochran Dec. at ¶ 24, Ex. 23 (Use of Deadly Force Review Board Findings).

1 Ramsdell.¹⁰¹ Although the Board found Officer Clark's actions to be within Department Policy,
 2 the Board included retraining requirements for Officer Clark which included recommendations
 3 to re-train in the areas of "Positioning Self Once Exiting His Patrol Vehicle" and
 4 "Environmental Awareness and Location within Potential Deadly Circumstance (Vehicle
 5 Position Angle-Positional reactions."¹⁰²
 6

7 Despite the recommendations for retraining, Officer Clark testified at his deposition that
 8 he did not receive specific retraining on these training recommendations, and he never talked
 9 with either Chief Ramsdell or Asst. Chief Ake about the shooting.¹⁰³

10 **G. Orn "Not Guilty" of Assault of Kristopher Clark**

11 In the wake of the shooting, the Pierce County Prosecutor's office, working together
 12 with TPD Detective Gene Miller, brought criminal charges against Than Orn seeking to convict
 13 Orn of Assault 2 for the alleged touching of Officer Clark with his vehicle and Felony
 14 Eluding.¹⁰⁴ After five days of testimony, the jury came back with "Not Guilty" verdicts for
 15 both the assault charge and felony eluding.¹⁰⁵ Orn was acquitted of the assault charge against
 16 Officer Clark but convicted of the misdemeanor of "Failing to Obey a Law Enforcement
 17 Officer."¹⁰⁶ He was assessed a \$250.00 fine.¹⁰⁷
 18

19 **H. TPD Chief of Police Donald Ramsdell Ratified the Use of Force Review Board's**

21 ¹⁰¹ Cochran Dec. at ¶ 24, Ex. 23.

22 ¹⁰² Cochran Dec. at ¶ 24, Ex. 23.

23 ¹⁰³ Cochran Dec. at ¶ 12, Ex. 11 at 171:6-25, 172:1-16, 173:6-11.

24 ¹⁰⁴ Cochran Dec. at ¶ 18, Ex. 17 at 38:5-20.

25 ¹⁰⁵ Cochran Dec. at ¶ 25, Ex. 24 (Verdict Forms, *State v. Orn*).

26 ¹⁰⁶ Cochran Dec. at ¶ 26, Ex. 25 (Acquittal, Judgment and Sentence, *State v. Orn*).

¹⁰⁷ Cochran Dec. at ¶ 26, Ex. 25.

Determination and Admitted that TPD Officers Violated TPD Policies.

The City's Chief of Police, Donald Ramsdell, admitted during his deposition that through his concurrence therewith, the Use of Force Review Board's determination that Clark's use of force was within department policy became the decision of the Tacoma Police Department:

Q But as the ultimate—you ultimately received the review board's findings, correct, as chief of police?

A Correct.¹⁰⁸

Q And you ultimately received the use of deadly force findings as well, correct?

A Correct.

Q And did you have to ultimately accept those findings?

A Ultimately it was my review and determination to concur with the review board's findings, in which I did.

Q So you concurred with the review board's findings, and so that became an actual decision of the Tacoma police department when you concurred with the review board's findings, correct?

A Correct.¹⁰⁹

Chief Ramsdell also made the following admissions during his deposition testimony.

¹⁰⁸ Cochran Dec. at ¶ 11, Ex. 10, at 44:23-25.

¹⁰⁹ Cochran Dec. at ¶ 11, Ex. 10, at 45:1-11.

1. Chief Ramsdell Admits that TPD Policy Only Allowed Roadblocks in Situations Permitting the Use of Deadly Force.

Chief Ramsdell admitted under oath that pursuant to TPD policy 15.08.001,¹¹⁰ which dated back all the way to at least 1996, roadblocks, like the one used by Kristopher Clark on October 12, 2011, with Than Orn, were only meant for situations which already justified an officer's use of deadly force.

Q Chief, what was the policy for using a TPD vehicle as a blocking-- a road-blocking mechanism, at that time?

...

A Typically roadblocks fall under a scenario where officers would be in a position to use deadly force as a roadblock-- as an offensive situation, much like a PIT maneuver, wherein officers are set up to try to stop the vehicle.

I believe in our policy, it basically states that it is used in instances where an officer would be using deadly force—

Q (By Mr. Cochran) It's a last-ditch effort, right?

A Yes.¹¹¹

...

Q What is it about a roadblock, as you understand it, as chief of police for the Tacoma police department, that necessitates a special instruction that it should not be employed, except as a last resort necessitating the application of deadly force to a life-threatening suspect?

¹¹⁰ Cochran Dec. at ¶ 27, Ex. 26 (TPD Policy 15.08.001).

¹¹¹ Cochran Dec. at ¶ 11, Ex. 10, at 16: 7-20, 20:16-25; 21:1-9.

1 A My interpretation would be that the officers are
2 potentially putting their own lives at risk.

3 Q But what is it specifically about using a roadblock that
4 Tacoma police department officers should only use that
5 in a last resort?

6 A Because that would be the last resort of trying to stop an
7 individual that is an imminent threat of death or serious
8 bodily injury to officers and/or the public.¹¹²

9 **2. Officer Clark Used His Patrol Vehicle as a Roadblock Even Though There**
10 **Was No Justification for Using Deadly Force Against Than Orn.**

11 Q So you would agree that in the review of the facts in the
12 case, the use of deadly force review board concluded,
13 based on their review, that the officers were blocking the
14 roadway, right?

15 ...

16 A Yes.¹¹³

17 ...

18 [Q] Would you agree with me that based on Officer Rose's
19 statement, Officer Clark's statement, by the summary of
20 the use of deadly force review board, that Officer Clark
21 positioned his vehicle in a way to block Than Orn?

22 A It appeared from the documentation, yes.¹¹⁴

23 ...

24 [Q] Would you agree with me that [Orn] was not a life-
25 threatening suspect at the time that Officer Clark
26

¹¹² Cochran Dec. at ¶ 11, Ex. 10, at 23:13-25, 24:1-4.

¹¹³ Cochran Dec. at ¶ 11, Ex. 10, at 17:24-25, 18:1-5.

¹¹⁴ Cochran Dec. at ¶ 11, Ex. 10, at 20: 24-25, 21:1-4.

positioned his vehicle so that it blocked the thoroughfare in the apartment complex?¹¹⁵

...

A He was not a life-- from my understanding and my review, in regards to the pursuit, it didn't appear that he was a life-threatening subject at that time of the pursuit.¹¹⁶

3. Officer Clark's Patrol Vehicle Roadblock Was Against TPD Policy and Fell Below Chief Ramsdell's Expectations.

Q Would you agree that based on the documents that you've reviewed, the documents that I've showed you here today, including the statement of Officer Clark and the recorded statement of Officer Rose, that Officer Clark put his vehicle in a blocking position to Than Orn's thoroughfare?

A Yes.

Q And would you agree that this was not a life-threatening situation, such that it called for a blockade of Than Orn's thoroughfare?

...

A The circumstances that led up to it may not have justified the roadblock.¹¹⁷

...

[Q] Would you agree that Officer Clark's use of his vehicle to block the road, in the incident involving Than Orn, fell below your expectations as chief of police for a Tacoma police department officer?

¹¹⁵ Cochran Dec. at ¶ 11, Ex. 10, at 23:1-4.

¹¹⁶ Cochran Dec. at ¶ 11, Ex. 10, at 23:10-12.

¹¹⁷ Cochran Dec. at ¶ 11, Ex. 10, at 25:17-25, 26:1-5.

1 A Yes, given the circumstances on the particular tactics, in
2 relation to our policies.¹¹⁸

3 ...

4 Q Would you agree that his actions, using the vehicle to
5 block the road, involving the incident with Than Orn,
6 was a violation of policy?

7 ...

8 A By strictly looking at the policy, yes.¹¹⁹

9 ...

10 Q Would you agree with me that on a more probable than
11 not basis, had Officer Clark not blocked the road, he
12 would not have been in the position where he felt he
13 needed to use deadly force?

14 ...

15 A Possibly.¹²⁰

16 ...

17 [Q] Did Kristopher Clark put his own life in jeopardy by
18 positioning his vehicle in the way that he did in the
19 apartment complex involving the incident with Than
20 Orn on October 12th, 2011?

21 ...

22 A He could have, yes.

23 Q He put his partner's life in jeopardy by placing the
24 vehicle the way that he did in the incident involving
25 Than Orn on October 12th, 2011, didn't he?
26

¹¹⁸ Cochran Dec. at ¶ 11, Ex. 10, at 30:23-25; 31:1-3.

¹¹⁹ Cochran Dec. at ¶ 11, Ex. 10, at 32:1-6.

¹²⁰ Cochran Dec. at ¶ 11, Ex. 10, at 33:4-14.

A He could have, yes.¹²¹

...

Q And based upon the definition that you've-- the policy that we've read over and over again, [Officer Clark] put Than Orn's life and safety in jeopardy by positioning the vehicle the way that he did on October 12th, 2011 in the parking lot in the incident involving Than Orn, didn't he?

...

A He could have.

Q And he did ultimately use deadly force on Than Orn, didn't he?

A Yes, he did.

Q And based upon your review of the facts and circumstances of this case, and the concurrence that you ultimately gave to both the pursuit review board's findings and the use of deadly force review board's findings, would you agree that Kristopher Clark's use of deadly force was a result of his positioning the vehicle the way that he did on October 12th, 2011?

...

A It could have.¹²²

4. According to Chief Ramsdell, Officer Clark's Use of Roadblock to Stop Than Orn Was Not Reasonable.

Q So just so that I'm perfectly clear, Kristopher Clark's use of a roadblock was not reasonable when Than Orn drove into the parking lot on October 12th of 2011?

¹²¹ Cochran Dec. at ¶ 11, Ex. 10, at 51:10-20.

¹²² Cochran Dec. at ¶ 11, Ex. 10, at 51:24-25, 52:1-21.

1 A If the intention was on Officer Clark's circumstances-- if
2 the intention was a roadblock as opposed to something
else, as a containment.

3 Q What is the difference between a roadblock and a
4 containment?

5 A A containment is trying to contain a subject or suspect,
6 whether they're on foot-- typically most of the times
7 when they're on foot-- we have a containment in case an
individual suspect gets out of a vehicle, starts running,
8 we set up a containment for that individual not to be able
to-- we have officers assigned at the perimeter or inner
9 perimeter, outer perimeter for the employment of a
canine, if necessary, and/or getting the individual into
10 custody by cutting off any avenues that he or she may
have.

11 Q But here Than Orn wasn't on foot, right?

12 A Correct.

13 Q Is there anything that you have reviewed, in your
14 concurrence on the ultimate findings of each of the
review boards, that leads you to believe that this was a
15 containment by Kristopher Clark?

16 A Just the wording within the review boards' findings.
17 They were trying to contain him within the parking lot.

18 Q But they actually blocked his avenue of egress, correct?

19 A Could you ask that again, please?

20 Q They blocked his avenue of egress, correct?

21 A Correct, they attempted to.

22 Q And they did, right? He ultimately drove around them?

23 A Correct.

24 Q And the use of the roadblock, with regard to Than Orn,
25 is not in keeping with the use-of-force model employed
by the Tacoma police department at that time, correct?
26

1 ...

2 A As reflected in the policy, by virtue of the policy, correct.¹²³

3 **I. Than Orn's Permanent Paralysis and Medical Treatment.**

4 Plaintiff Than Orn was struck multiple times in the neck, right shoulder and back, by
5 Defendant Clark's gunshots.¹²⁴ According to medical reports, Than Orn suffered complete
6 spinal cord injury at the first lumbar vertebra due to a bullet lodged in his spine.¹²⁵ He also
7 suffered severe cervical spine trauma including fractures of the fourth, fifth and sixth vertical
8 vertebrae transverse process, as well as a fracture to his right scapular.¹²⁶ He has undergone
9 extensive medical treatment in regards to caring for his wounds. Ultimately, Plaintiff Than Orn
10 underwent a bilateral above the knee double leg amputation, as he was never expected to
11 recover any function below the L1 level of his spine and the constant risk of infection in his
12 legs posed a mortal risk to his health.¹²⁷

15 **J. Destruction of the parent-child relationship between Than Orn and his children
16 J.O., C.O., and Thalisa Orn.**

17 Following the shooting, Plaintiff Than Orn's marriage disintegrated.¹²⁸ He further lost
18 time and contact with his children, resulting in the destruction of the parent-child
19
20
21

22 ¹²³ Cochran Dec. at ¶ 11, Ex. 10 at p. 49:1-25, 50:1-16.

23 ¹²⁴ Cochran Dec. at ¶ 28, Ex. 27, at 34 (clinic note from Dr. Michelle L. Strong, dated October 12, 2011).

24 ¹²⁵ Cochran Dec. at ¶ 28, Ex. 27, at 37-39.

25 ¹²⁶ Cochran Dec. at ¶ 28, Ex. 27, at 38-39.

26 ¹²⁷ Cochran Dec. at ¶ 29, Ex. 28 (clinic note from Dr. Nicholas D. Garcia).

¹²⁸ Cochran Dec. at ¶ 2, Ex. 1, at 20:1-11, 151:12-25, 152:1-25, 153:1-12.

relationship.¹²⁹ As a result, Plaintiffs J.O., C.O., and Thalisa Orn have lost the care, affection, companionship, society, support and consortium of their father.

III. LEGAL AND EVIDENTIARY ISSUES

A. 42 U.S.C. § 1983: Violation of Fourth Amendment as to Kristopher Clark

Kristopher Clark violated the Fourth Amendment's clearly established prohibitions against excessive force when he employed the use of deadly force against Than Orn for failing to yield or failing to obey instructions without any objectively reasonable belief that Orn posed an immediate threat of harm to himself or others. Than Orn was unarmed and was not suspected of a violent criminal offense. Moreover, Orn was driving out of the path of police officers at an extremely slow speed, but Clark affirmatively created a danger by unlawfully establishing a roadblock which endangered his partner officer, getting out of his vehicle against orders, drawing his gun, chasing the path of Orn's vehicle, and firing 10 rounds at Orn through the passenger side and rear of Orn's vehicle with deliberate indifference to the safety of Orn and those in the immediate vicinity.

The Fourth Amendment proscribes unreasonable searches and seizures. *Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994). The reasonableness of a search or seizure depends "not only on *when* [it] is made, but also *how* it is carried out." *Cameron v. Craig*, 713 F.3d 1012, 1021 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct.1694, 85 L.Ed.2d 1 (1985)). "In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion." *Id.*

¹²⁹ Cochran Dec. at ¶ 2, Ex. 1, at 14:17-25, 15:1-4, 17:18-25, 18:3-9, 16-25, 19:1-9.

1 The reasonableness of a particular search or seizure must be “assessed by carefully
 2 considering the objective facts and circumstances that confronted the [involved] officer or
 3 officers.” *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir.1994) (citing *Graham v. Connor*, 490
 4 U.S. 386, 396, 109 S.Ct.1865, 104 L.Ed.2d 443 (1989)). “While a court (or jury) may ‘look to
 5 whatever specific factors may be appropriate in a particular case,’ the Supreme Court has
 6 articulated three factors that courts should typically consider: (1) the severity of the crime at
 7 issue;(2) whether the suspect poses an immediate threat to the safety of the officers or others;
 8 and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.”
 9 *Cameron v. Craig*, 713 F.3d at 1021 (quoting *Franklin v. Foxworth*, 31 F.3d at 876, and citing
 10 *Graham*, 490 U.S. at 396, 109 S.Ct. 1865). “Crucially, “[b]ecause questions of reasonableness
 11 are not well-suited to precise legal determination, the propriety of a particular use of force is
 12 generally an issue for the jury.” *Chew*, 27 F.3d at 1440 (citations omitted); *see also Coles v.*
 13 *Eagle*, 704 F.3d 624, 628 (9th Cir. 2012).

14 Officer Clark intentionally used deadly force on Than Orn intending to injure or
 15 otherwise disable Orn from continuing to drive.¹³⁰ Therefore, the applicable analysis here is
 16 that of a “seizure” subject to Fourth Amendment inquiry. *Tennessee v. Garner*, 471 U.S. 1, 7,
 17 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). The Supreme Court has established that an officer’s use
 18 of force, including deadly force, violates a Fourth Amendment right if it is excessive under
 19 objective standards of reasonableness. *Scott v. Harris*, 550 U.S. 372, 382–83, 127 S.Ct. 1769,
 20 167 L.Ed.2d 686 (2007); *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir. 2007); *see also Graham*
 21

22
 23
 24
 25
 26

¹³⁰ Declaration of TPD Officer Kristopher Clark at ¶¶ 18-19. Dkt. 92.

1 v. *Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (holding that a claim
 2 that a law enforcement official used excessive force in making an arrest, investigatory stop, or
 3 other “seizure” is judged under the Fourth Amendment’s objective “reasonableness” standard).

4 The Fourth Amendment test is whether the force used in a seizure was “objectively
 5 reasonable.” *Graham*, 490 U.S. at 388, 109 S.Ct. 1865; see *Espinosa v. City and County of San*
 6 *Francisco*, 598 F.3d 528, 537 (9th Cir. 2010). “Determining whether a particular use of force
 7 is reasonable requires the fact-finder to balance the nature and quality of the intrusion on the
 8 individual’s Fourth Amendment interests against the countervailing government interests at
 9 stake.” *Boyd v. Benton County*, 374 F.3d 773, 778-779, (9th Cir. 2004). Accordingly, “[t]his
 10 balance must be judged from the perspective of a reasonable officer on the scene, rather than
 11 with the 20/20 vision of hindsight.” *Id.*

12 *Graham* lists the factors relevant to the merits of an excessive force claim: “requiring
 13 careful attention to the facts and circumstances of each particular case, including the severity
 14 of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers
 15 or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”
 16 *Graham*, 490 U.S. at 396. The relevant question here under the Fourth Amendment analysis
 17 is whether the gunshots that struck Than Orn resulted from an objectively reasonable exercise
 18 of deadly force based on an examination of the totality circumstances. *Boyd*, 374 F.3d at 778-
 19 779. The key issue in this case is whether a reasonable officer would have perceived Than
 20 Orn’s actions as an immediate threat of death or serious physical injury at the time Kristopher
 21 Clark shot Orn. This requires a factual examination of the totality of the circumstances which
 22
 23
 24
 25
 26

1 lead to Officer Clark's decision to fire.¹³¹ The "settled and exclusive framework" for
 2 determining the reasonableness of excessive force is "whether the totality of the circumstances
 3 justifie[s] a particular sort of search or seizure." *County of Los Angeles v. Mendez*, 137 S.Ct.
 4 1539, 1546 (2017) (quoting *Tennessee v. Garner*, 471 U. S. 1, 8–9.); *see also*, *Maddox on behalf*
 5 *of D.M v. City of Sandpoint*, 2:16-CV-00162-BLW, 2017 WL 4343031, at *13 (D. Idaho Sept.
 6 29, 2017); *Felts v. Bd. of Cty. Commissioners of Valencia Cty.*, 13-CV-1094 MCA/SCY, 2017
 7 WL 4480118, at *2–3 (D.N.M. Oct. 6, 2017).

9 It is routine for a police officer to prepare a statement, with the assistance of a union
 10 representative and counsel, which predictably claims that an officer who used deadly force did
 11 so because he was in fear for his own safety or the safety of others, just like Kristopher Clark
 12 did in this case.¹³² In fact, former TPD Detective Gene Miller testified that in every officer-
 13 involved shooting that he's worked, every officer has said that he or she perceived a direct
 14 threat to himself, a fellow officer or a member of the public.¹³³ "Yes. I can't think of any I
 15 investigated where that wouldn't be a true statement."¹³⁴ For that reason, "A simple statement
 16 by an officer that he fears for his safety or the safety of others is not enough, there must be
 17 objective facts to justify such concern." *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir.
 18 2001).

22 ¹³¹ The reasonableness of a particular use of force cannot be determined through the application of mechanical
 23 rules because reasonableness must "be assessed by carefully considering the objective facts and circumstances
 24 confronting the officers," *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005). As such, determining whether
 a particular use of force was unreasonable is a highly fact specific inquiry.

25 ¹³² Cochran Dec. at ¶ 29, Ex. 28 (Statement of Kristopher Clark).

26 ¹³³ Cochran Dec. at ¶ 2, Ex. 1, at p. 90:8-14.

¹³⁴ Cochran Dec. at ¶ 2, Ex. 1, at p. 90:8-14.

As demonstrated above, the testimony of other officers on scene and the physical evidence do not support Officer Clark's use of deadly force against Than Orn. Plaintiffs' expert law enforcement professionals do not support the use of deadly force in this case, either. Police expert and former Bellevue Police Chief D.P. Van Blaricom has opined that based on his training, experience and a careful evaluation of the totality of circumstances in this matter, Plaintiff Than Orn did not pose a significant threat of death or serious physical injury to either the shooter, Officer Clark, or others at the time he was shot, and the use of deadly force was both unnecessary and unreasonable.¹³⁵ Among the most critical points to Chief Van Blaricom's opinion is that indisputably, all of Clark's shot were into the right side and/or the right rear of Than Orn's vehicle: "1) Accordingly, [Clark] was standing to the right of the plaintiff's vehicle and firing as it passed him by, 2) Thereafter, [Clark] was standing at the rear of plaintiff's vehicle and continued to fire as it drove away from him[.]"¹³⁶ Van Blaricom also takes issue with Officer Clark's suggestion that other officers and/or private citizens could "*possibly*" have become victims of plaintiff's further driving.¹³⁷ "The standard of care for use of deadly force is probable cause to believe that a suspect poses a significant threat of death or serious physical injury to the officer or others. Given the totality of circumstances known to the shooter, Officer Clark, there simply was no such "*probable cause*" and he cannot substitute "*possible*" for

¹³⁵ Declaration of D.P. Van Blaricom, at ¶11. Dkt 99.

¹³⁶ Declaration of D.P. Van Blaricom, at ¶11. Dkt 99.

¹³⁷ Declaration of D.P. Van Blaricom, at ¶11. Dkt 99.

1 “probable” – if he could, literally any police shooting could/would be justified, regardless of
2 the facts.”¹³⁸

3 Furthermore, Van Blaricom opines that Officer Clark intentionally and or recklessly
4 provoked the unnecessary confrontation that resulted in Officer Involved Shooting (OIS).¹³⁹

5
6 Plaintiff was not creating a risk to anyone, when
7 Clark established a roadblock to stop his further
8 progress and, as previously quoted herein from
9 TPD policy P3.2, such roadblocks are limited to
10 ‘a last resort necessitating the application of
11 **deadly force to a life-threatening** (emphases in
original) *suspect*’... Clark’s implementation of
an unauthorized roadblock, followed by use of
unreasonable deadly force, resulted in unarmed
plaintiff being paralyzed for life.¹⁴⁰

12 Plaintiffs’ other police expert Edward “Tad” Leach,¹⁴¹ former Undersheriff at the
13 Kootenai County Sheriff’s Department in Coeur d’Alene, Idaho, also found Officer Clark’s use
14 of force unreasonable based on a totality of the circumstances as prescribed by *Connor v.*
15 *Graham*. “I am of the opinion... that Officer Clark’s utilization of deadly force against Plaintiff
16 Than Orn was unwarranted, excessive and that a reasonable officer in the same position would
17 not have used his firearm whatsoever, let alone ten (10) to eleven (11) times.”¹⁴² Among many
18 concerns Leach found with Officer Clark’s specific actions, he found Officer Clark’s
19

20
21
22 ¹³⁸ Declaration of D.P. Van Blaricom, at ¶11. Dkt 99.

23 ¹³⁹ Declaration of D.P. Van Blaricom, at ¶12. Dkt 99.

24 ¹⁴⁰ Declaration of D.P. Van Blaricom, at ¶ 12. Dkt 99.

25 ¹⁴¹ Plaintiffs plan to call only one of their police practices experts at trial pursuant to Judge Leighton’s prior ruling
26 limiting Plaintiffs to one police practices expert. Dkt. 123 (Order on Plaintiffs’ and Tacoma Defendants’ Motions
in *Limine*). Both their opinions are included herein because Plaintiffs are not certain whether Van Blaricom will
be capable of testifying, thus requiring Plaintiffs to present testimony from Leach as an alternative.

¹⁴² Declaration of Edward “Tad” Leach at ¶ 4. Dkt. 100.

1 explanation of where he was when he decided to use deadly force to be unreasonable.

2 Orn's vehicle was passing or had passed Officer
 3 Clark when he utilized deadly force. A
 4 reasonable officer would not conclude that; "As
 5 Orn presented an immediate and continuing
 6 threat to me [Officer Clark], assisting officers
 7 and citizens, I believed deadly force was
 8 necessary to safely achieve control." Officer
 9 Clark acknowledged that he was at the passenger
 10 right quarter panel in line with the wheel.
 11 Therefore, any actual or perceived threat of
 12 being struck by Orn's vehicle was already over
 13 when Clark utilized deadly force.¹⁴³

14 Here, as best exemplified in the audio recording of the Computer Aided Dispatch
 15 (CAD)¹⁴⁴ from the night of the incident and in the statements from the Chief of Police all the
 16 way down to patrol officers at the scene on October 12, 2011, TPD did not consider Than Orn
 17 to be a threat. He failed to have his headlights on, which was a traffic violation, and then he
 18 failed to stop. But, as TPD's own pursuit review board concluded, Orn was not acting
 19 recklessly. Furthermore, although Officer Clark's prepared statement claims that he was
 20 concerned about his partner's safety, his partner, Officer Donald Rose, says that Clark never
 21 mentioned anything about Rose's safety, or anyone else's.¹⁴⁵ Officer Clark's decision to shoot
 22 at Than Orn's vehicle was plainly unreasonable.

23
 24 ¹⁴³ Declaration of Edward "Tad" Leach at ¶ 11. Dkt. 100.

25 ¹⁴⁴ Cochran Dec. at ¶ 31, Ex. 30 (9-1-1 Transmission Transcript, 11UOF-0001).

26 ¹⁴⁵ Cochran Dec. at ¶ 7, Ex. 6, at 62:21-25, 63:1-5, 68:15-25, 69:1.

B. 42 U.S.C. § 1983: Violation of the Fourth and Fourteenth Amendment as to City of Tacoma – *Monell* Claim

City of Tacoma violated the Fourth and Fourteenth Amendment. Defendant City of Tacoma and the Tacoma Police Department have customs, policies, and practices that amount to deliberate indifference to the rights of persons with whom its officers regularly come into contact, including nonviolent suspects like Than Orn. Defendants City of Tacoma and the Tacoma Police Department, with deliberate indifference, failed to train the Tacoma Police Department's law enforcement officers and failed to adopt and implement policies for, among other things, the use of de-escalation techniques, non-lethal tactics, proper nonviolent suspect apprehension techniques, and the decision-making process that should accompany use of deadly force. The failure by Defendant City of Tacoma and the Tacoma Police Department to adequately and appropriately train its officers and employee amounts to deliberate indifference to the rights of the persons with whom the Tacoma Police Department's employees regularly come into contact, including nonviolent suspects like Than Orn. It was highly predictable that Defendant's failures would result in constitutional violations, like those that occurred in this case. Plaintiff's permanently debilitating injuries are the foreseeable consequence of the Tacoma Police Department's failure to equip its law enforcement officers with the necessary training and tools to handle recurring situations, such as those involving a nonviolent suspect failing to yield or failing to obey an officer's instructions. The actions of the officers involved, which deprived the Plaintiff of his Constitutional rights, conformed to official policy, custom, and practice of Defendant City of Tacoma. Defendant City of Tacoma and the Tacoma Police Department's policy of shooting an unarmed individual failing to yield, but avoiding officers

PLAINTIFFS' TRIAL BRIEF

1 and driving at an extremely low speed is blatantly unconstitutional and jeopardizes the safety
 2 of all citizens, as evidenced by the police shooting of Than Orn. Moreover, Defendant City of
 3 Tacoma has ratified the conduct of Defendant Clark in relation to the injuries of Than Orn, by
 4 refusing to appropriately sanction Defendant Clark for his actions.

5 **1. Ratification of Violations of Than Orn's Fourth Amendment Rights**

6
 7 A §1983 plaintiff may prevail against a municipality, under *Monell v. New York City*
 8 *Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978), by proving “that an official with final
 9 policy-making authority ratified a subordinate's unconstitutional decision or action and the basis
 10 for it.” *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992). If the authorized
 11 policymakers “approve a subordinate's decision and the basis for it, their ratification would be
 12 chargeable to the municipality because their decision is final.” *Bouman v. Block*, 940 F.2d 1211,
 13 1231 (9th Cir. 1991) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S.Ct. 915,
 14 99 L.Ed.2d 107 (1988)).

15
 16 The City of Tacoma and TPD are liable under *Monell* based on the ratification theory
 17 for the finding of the Use of Deadly Force Review Board's that Officer Kristopher Clark's
 18 actions in using deadly force against Than Orn on October 12, 2011 were lawful and within
 19 policy.¹⁴⁶ The Board's findings were explicitly approved by Chief of Police, Donald Ramsdell,
 20 who himself admitted during his deposition that his decision to approve the findings constituted
 21 an approval of those findings by TPD.¹⁴⁷

22
 23
 24
 25 ¹⁴⁶ Cochran Dec. at ¶ 24, Ex. 23.

26 ¹⁴⁷ Cochran Dec. at ¶ 11, Ex. 10, 44:23-25.

2. Violations of Than Orn's and his children's Fourteenth Amendment rights.

Ninth Circuit precedent holds that “a parent who claims loss of the companionship and society of his or her child, or vice versa ... has a constitutionally protected liberty interest under the Fourteenth Amendment in the companionship and society of his or her child” *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (citing *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986); *Kelson v. City of Springfield*, 767 F.2d 651, 653–55 (9th Cir. 1985)); see also *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998) (noting that plaintiffs “may assert a Fourteenth Amendment claim based on the related deprivation of their liberty interest arising out of their relationship with [their deceased son]”). This is true even where the deprivation is incidental to the state's acts. *Ostling v. City of Bainbridge Island*, 872 F.Supp.2d 1117, 1127 (W.D.Wash. 2012).

Official conduct that “shocks the conscience” in depriving children or parents of that interest is cognizable as a violation of due process. *Wilkinson v. Torres*, 610 F.3d 546, 555 (9th Cir.2010) (citations omitted). Where “actual deliberation is practical, then an officer's ‘deliberate indifference’ may suffice to shock the conscience.” *Id.* On the other hand, “where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.” *Id.*

Defendant Kristopher Clark had the time, and took the time, for actual deliberation and yet he used deadly force against Than Orn, leaving him critically injured and ultimately paralyzed. This was not a snap decision. Officer Clark ignored orders to stay in his vehicle. He deliberately created a roadblock in a situation that did not warrant the use of deadly force.

PLAINTIFFS' TRIAL BRIEF

1 And then, as the objective evidence shows, he fired at Than Orn as Orn's vehicle was passing
 2 Clark when there was no danger of imminent harm to Clark or to anyone else. Further, Clark
 3 continued to fire at Orn's vehicle seven to eight more times as it was traveling away from Clark.
 4 In using such excessive force, Kristopher Clark materially diminished Than Orn's relationship
 5 with his children. As TPD ratified such use of excessive force, the City of Tacoma is liable to
 6 Thalisa Orn and her siblings J.O. and C.O., for Clark's violation of their substantive due process
 7 interest in the companionship of their father, Than Orn. *Ostling v. City of Bainbridge Island*,
 8 872 F.Supp.2d at 1127.

10 **C. Battery as to Kristopher Clark**

11 Washington recognizes the state tort of battery by a law enforcement officer in an
 12 excessive force case. *Staats v. Brown*, 139 Wn. 2d 757, 780, 991 P.2d 615 (2000). "Battery is
 13 an intentional tort; the tortfeasor must intend an offensive touching, and the plaintiff must show
 14 there was no consent to the touching." *Bundrick v. Stewart*, 128 Wn. App. 11, 18, 114 P.3d
 15 1204 (2005).

17 Here, Defendant Kristopher Clark intentionally shot plaintiff Than Orn multiple times
 18 hitting him in the neck, shoulder, and back, and thereby inflicting a harmful contact on Than
 19 Orn.¹⁴⁸ There is no dispute that Than Orn did not consent to being shot.

21 **D. Negligence as to City of Tacoma**

22 "Claims of negligent law enforcement are not novel." *Beltran-Serrano v. City of*
 23 *Tacoma*, 193 Wn.2d 537, 543, 442 P.3d 608, 611 (2019). Washington courts have long

25 ¹⁴⁸ Declaration of TPD Officer Kristopher Clark at ¶¶ 18-19. Dkt. 92.

1 recognized the potential for tort liability based on the negligent performance of law enforcement
 2 activities. *See, e.g., Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275 (2013)
 3 (negligent service of a protective order); *Chambers-Castanes v. King County*, 100 Wn.2d 275,
 4 669 P.2d 451 (1983) (negligent failure to respond with police assistance in a timely manner);
 5 *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (negligent police vehicle chase); *Garnett*
 6 *v. City of Bellevue*, 59 Wn.App. 281, 796 P.2d 782 (1990) (negligent infliction of emotional
 7 distress for officers' harsh and offensive language in responding to a call that plaintiffs were
 8 loitering). Indeed, such liability is consistent with the broad waiver of sovereign immunity for
 9 municipalities under RCW 4.96.010.
 10

11 In the case at hand, all the elements are met to establish the four essential elements for
 12 a negligence claim: duty, breach, proximate cause, and resulting harm. *Pedroza v. Bryant*, 101
 13 Wn.2d 226, 228, 677 P.2d 166 (1984); *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483
 14 (1992); *Kennedy v. Sea-Land Serv., Inc.*, 62 Wn. App. 839, 856, 816 P.2d 75 (1991). The City
 15 of Tacoma here was negligent in causing foreseeable harm in the course of TPD's interactions
 16 with Mr. Orn. In *Beltran-Serrano*, the Washington Supreme Court found that the "core" of
 17 plaintiff's negligence claim against the City of Tacoma "is that Officer Volk unreasonably
 18 failed to follow police practices calculated to avoid the use of deadly force." *Beltran-Serrano*,
 19 193 Wn.2d at 544. Plaintiffs may pursue both an intentional tort, such as a battery claim, as
 20 well as negligence claims. *Id.* at 548. "Under Washington common law, the City owes a duty
 21 to refrain from causing foreseeable harm in the course of law enforcement interactions with
 22 individuals." *Id.* at 552.
 23
 24
 25
 26

PLAINTIFFS' TRIAL BRIEF

1 Plaintiff Than Orn was injured because of TPD's repeated flouting of its own policies,
 2 including TPD's improper pursuit of Mr. Orn, TPD's policy-violating "rolling roadblock,"
 3 TPD's failure to remove its scene commander, Sgt. Morris, from the lead car during the pursuit,
 4 Officer Clark's improper use of his vehicle as a roadblock to stop Orn's vehicle which created
 5 a life-threatening point of confrontation with law enforcement, Officer Clark's defiance of
 6 dispatch commands to remain in his vehicle, and Officer Clark's decision to approach Orn's
 7 vehicle and fire ten to eleven bullets at Orn, further endangering the public in the direction of
 8 his range of fire.
 9

10 Thus, Defendant City of Tacoma, through the policy-violating conduct of TPD officers,
 11 including Officer Clark, created the dangerous circumstances in which Plaintiff Than Orn was
 12 confronted with the unlawful use of deadly force. The City of Tacoma is liable for the negligent
 13 acts of its law enforcement officers by operation of *respondeat superior*, or vicarious liability.
 14 *Respondeat superior*, or vicarious liability, imposes liability on an employer for the torts of an
 15 employee who is acting on the employer's behalf within the scope of employment. *Niece v.*
 16 *Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420. *Respondeat superior* is analytically
 17 distinct and separate from a cause of action for negligent hiring, retention, and supervision. *Id.*
 18 at 48. Defendant City of Tacoma was responsible for the actions of its agents and employees
 19 under the theory of *respondeat superior*. The doctrine of *respondeat superior* "imposes liability
 20 on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v.*
 21 *Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). Defendant City of Tacoma,
 22 through its employees, including the named individual defendant Kristopher Clark and the
 23 officers who engaged in a police pursuit of Than Orn, owed a duty to use reasonable care with
 24
 25
 26

PLAINTIFFS' TRIAL BRIEF

3:13-cv-05974-MJP | Page 45 of 49

PFAU COCHRAN
VERTETIS AMALA
 ATTORNEYS AT LAW

909 A Street, Suite 700
 Tacoma, WA 98402
 (253) 777-0799 | Fax: (253) 627-0654
 www.pvalaw.com

1 regard to its attempts to take Than Orn into police custody. Defendant City of Tacoma, through
 2 its employees, including the named individual defendant Kristopher Clark and the officers who
 3 engaged in a police pursuit of Than Orn, violated that duty through the following activities,
 4 including but not limited to, engaging in a police pursuit against policy, blocking all avenues
 5 of exit against policy, and firing a weapon into the rear of a moving vehicle when the vehicle
 6 and its occupant, Than Orn, did not pose an imminent threat of death of serious bodily injury
 7 to any person.
 8

9 **E. Damages**

10 Plaintiffs intend to seek damages relating to Orn's injuries, subsequent medical
 11 treatment, and pain and suffering. Plaintiffs also seek damages for the loss of the parent child
 12 relationship between Than Orn and his three children, J.O., C.O., and Thalisa Orn. Finally,
 13 Plaintiffs also intend to seek punitive damages against Defendant Kristopher for his willful and
 14 malicious shooting of Than Orn.
 15

16 Section 1983 was "intended to 'create a species of tort liability' in favor of persons
 17 deprived of federally secured rights." *Smith v. Wade*, 461 U.S. 30, 34, 103 S.Ct. 1625, 75
 18 L.Ed.2d 632 (1983) (quoting *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042, 55 L.Ed.2d
 19 252 (1978)). Further, the common law of torts governs the recoverable damages for liability
 20 under § 1983. *Id.* Accordingly, when the Supreme Court determined the requisite mental state
 21 and conduct for a punitive damages award under § 1983, the Court looked to applicable tort
 22 law concepts. See *id.* at 38, 103 S.Ct. 1625.
 23

24 In *Smith v. Wade*, the Court considered whether punitive damages could be awarded
 25 only for intentionally malicious conduct or whether the district court properly instructed the
 26

PLAINTIFFS' TRIAL BRIEF

1 jury that it could award punitive damages “if the conduct of one or more of the defendants is
 2 shown to be a reckless or callous disregard of, or indifference to, the rights or safety of others.”
 3 *Id.* at 33, 103 S.Ct. 1625. Focusing on the standards for punitive damages at the time of the
 4 enactment of § 1983, the Court concluded that federal and state courts agreed that punitive
 5 damage awards “did not require a showing of actual malicious intent; they permitted punitive
 6 awards on variously stated standards of *negligence, recklessness, or other culpable conduct*
 7 short of actual malicious intent.” *Id.* at 45, 103 S.Ct. 1625 (emphasis added). “[W]e have
 8 frequently operated under the assumption that [a punitive damage] instruction is proper [in
 9 federal civil rights cases for oppressive conduct.]” *Dang v. Cross*, 422 F.3d 800, 807 (9th Cir.
 10 2005).

12 The facts presented in this case warrant the inclusion of a punitive damages jury
 13 instruction as a jury could find that Officer Clark’s actions constituted gross negligence, willful
 14 or wanton misconduct, or a reckless disregard for the civil rights of the plaintiff: his improper
 15 and unlawful use of his patrol vehicle as a roadblock to stop a suspect who was neither
 16 assaultive nor life-threatening under TPD policies and the universally accepted continuum of
 17 force model; his defiance of repeated dispatch commands for officers to remain in their
 18 vehicles; his decision to fire 2-3 times at a vehicle that was passing him and was not an
 19 imminent threat of serious bodily harm or death to either Officer Clark or anyone else; his
 20 decision to continue firing 7-8 more times as the vehicle was traveling away from him, when
 21 neither he, nor anyone else was in imminent danger of serious bodily harm or death. These
 22 facts easily meet the threshold level sufficient to instruct the jury on the issue of punitive
 23 damages.
 24
 25
 26

PLAINTIFFS’ TRIAL BRIEF

3:13-cv-05974-MJP | Page 47 of 49

**PFAU COCHRAN
 VERTETIS AMALA**
 ATTORNEYS AT LAW

909 A Street, Suite 700
 Tacoma, WA 98402
 (253) 777-0799 | Fax: (253) 627-0654
www.pcvallaw.com

IV. CONCLUSION

Plaintiffs look forward to presenting their case when it is set to commence on November 23rd, 2020.

RESPECTFULLY Submitted this 30th day of October, 2020.

PFAU COCHRAN VERTETIS AMALA, PLLC

By /s/ Darrell L. Cochran

Darrell L. Cochran, WSBA No. 22851
Thomas B. Vertetis, WSBA No. 29805
Andrew S. Ulmer, WSBA No. 51227
Alexander G. Dietz, WSBA No. 54842
darrell@pcvalaw.com
tom@pcvalaw.com
aulmer@pcvalaw.com
adietz@pcvalaw.com

Attorneys for Plaintiffs

COCHRAN DOUGLAS, PLLC

By /s/ Loren A. Cochran

Loren A. Cochran, WSBA No. 32773
loren@cochrandouglas.com

Attorney for Plaintiffs

LAW OFFICE OF THOMAS A. BALERUD

By /s/ Thomas A. Balerud

Thomas A. Balerud, WSBA No. 19539
tbalerud@balerudlaw.com

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Andrew S. Ulmer, hereby declare under penalty of perjury under the laws of the United States of America that I am employed at Pfau Cochran Vertetis Amala PLLC and that on today's date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jean P. Homan
Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, WA 98402
jhoman@ci.tacoma.wa.us

Anne M. Bremner
Karen L. Cobb
Frey Buck, P.S.
1200 Fifth Ave, Suite 1900
Seattle, WA 98101
abremner@freybuck.com
kcobb@freybuck.com

DATED this 30th day of October, 2020

/s/ Andrew S. Ulmer
Andrew S. Ulmer
Associate Attorney

PLAINTIFFS' TRIAL BRIEF